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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1961

No. 982

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Petitioner,

versus

MRS. MARIA CONSUELO GARCIA DODART DEBRAM, Individually and for and on Behalf of Her Minor Daughter, Maria Andrea Dodart,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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May It Please the Court:

INTRODUCTION.

Defendant-appellant, Massachusetts Bonding & Insurance Company, has petitioned this Court to grant certiorari to review the judgment of the Fifth Circuit Court of Appeals, which affirms the judgment of the District

Court for the Eastern District of Louisiana, entered after a jury verdict awarding damages to passengers in the car which was involved in an accident with a car, the operation of which was insured by petitioner.

The matters which petitioner seeks to have reviewed are the same as those urged in and rejected by the district Court and the Court of Appeals. There is no complaint that the proper state law was not applied by these courts. Essentially, petitioner's contentions resolve themselves to the one point, that the evidence was insufficient to sustain the verdict.

REASONS FOR DENYING CERTIORARI.

I.

Petitioner Has Failed to Show a Valid Basis for Granting Certiorari Under Rule 19, Supreme Court Rules, 28 U. S. C. A., as Applied by This Court.

This is simply a suit for damages which resulted in a favorable verdict for the plaintiffs. The sufficiency of plaintiffs' showing of negligence on the part of the driver of the car insured by defendant was questioned during the trial by motion for a directed verdict, which was denied. A motion for judgment notwithstanding the verdict and alternatively for a new trial based on the same contention was refused. The same plea was rejected by the Court of Appeals (Fifth Circuit) in a *per curiam* decision, which applies two well-established legal principles. These are: that it is not the province of the

appellate court to determine whether the jury could have drawn different inferences or conclusions from the evidence presented or to decide what a court without a jury might have found; and, that an appellate court must construe the evidence most favorable to the appellees and give full effect to every legitimate inference therefrom and every reasonable conclusion based thereon.

The policy of this Court in its consideration of applications for writs of certiorari, under Rule 19 of the present rules of the Supreme Court, and under former Rule 38, par. 5 (38 U. S. C. A. 67, 68), has been well expressed by Chief Justice Taft, speaking for a unanimous court, in *Layne & Bowler v. Western Well Works, Inc.*, 261 U. S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (quoted with approval in *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 619, 620, 349 U. S. 70, 90 L. Ed. 897):

> "• • • the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Here there is no public question involved; no enunciation of legal principles which may have far-reaching effects in present and future litigation. This is a case of importance only to the parties involved, in that the plaintiffs by virtue of the results are compensated by petitioner for injuries received.

II.

There Was Ample Evidence Sufficient to Show Negligence on the Part of the Driver of the Vehicle Insured by Petitioner.

The record shows: that Williams, the driver of the insured car, was on an urgent mission for his employer (R. p. 131); that this car was more than 500 feet from the DeBram car (the one in which plaintiffs were passengers) when he could have seen this car with its front in the traffic lane next to the neutral ground of a four-lane highway (R. pp. 182-183); that he had warning of an unusual situation by the blinking lights of the DeBram car (R. pp. 224-229); that he continued on in this lane of traffic next to the neutral ground (R. pp. 176-179); that although there was ample opportunity, he failed to take available steps to avoid the accident (R. p. 135); and that he steadfastly refused to pin himself down to a fixed point as to when he saw or could have seen the DeBram car (R. pp. 147, 148, 150). There was testimony of disinterested witnesses, physical facts, maps and photographs supporting the DeBram version of the accident, which the jury chose to accept. The testimony of the witnesses for plaintiff and defendant was in conflict. Furthermore, Williams' lack of credibility was clearly demonstrated by his evasive testimony and by the fact that his version of how the accident happened as given in a written statement on the day after the accident did not coincide with his testimony at a deposition and on the trial.

The Court of Appeals, after a careful consideration of all of the evidence as contained in the record, concluded that there was sufficient evidence of Williams' negligence to warrant a submission of the case to the jury.

This Court in *Lavender v. Kurn, et al.*, 66 S. Ct. 740, 327 U. S. 645, 90 L. Ed. 916, dealing with the problem of "sufficiency of evidence," outlines the function of an appellate court where there is conflicting probative evidence which can support a finding either way. The Court said:

> "• • • But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (citations) • • •.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes

apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Under what clearly seems to be the firmly established policy of this Court, no reasonable basis has been pointed out by petitioner to warrant a review of the findings of the Court of Appeals. Prior decisions appear to support the rule that this Court will not review the findings of that court in matters involving weight or sufficiency of the evidence. In *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U. S. 498, 71 S. Ct. 453, 456, 95 L. Ed. 479, it is expressed as follows:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193."

Petitioner has quoted at length from the case of *Harshberger v. Associated Transport, Inc.*, 282 F. (2d)

179 (2d Cir.). Factually and legally this case has nothing in common with the present case. Primarily, the rights of guest passengers were not involved as is the case here. Furthermore, it appears that in the *Harshberger* case plaintiff's intestate or driver was alone in his car when killed in the accident. Plaintiff was not able to produce any direct evidence to substantiate his assumptions or theory as to how the accident happened, or to contradict the overwhelming evidence presented by defendant, including the testimony of defendant's driver, who lived. That case is not controlling here.

CONCLUSION.

It is urged that petitioner has failed to present to this Court a factual or legal situation which calls for the exercise of its reviewing jurisdiction. It is suggested that certiorari should not be granted.

All of which is respectfully submitted.

Respectfully submitted,

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CERTIFICATE.

The undersigned attorney for respondents certifies that a copy of this reply brief has been served on counsel for petitioner, Messrs. W. Ford Reese and Henry B. Alsobrook, Jr., 847 National Bank of Commerce Building, New Orleans 12, Louisiana, by placing same in the United States mail, postage prepaid, on June ....., 1962.

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RAYMOND H. KIERR